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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DAWN WILSON KOZICKI, et al., Plaintiffs and Respondents, v. LISA CRAIG, et al., Defendants and Appellants.	D052006 (Super. Ct. Nos. GIN058530, consolidated with GIN045417)

APPEAL from a judgment and order of the Superior Court of San Diego County, Michael B. Orfield, Judge. Affirmed as modified.

Defendants and appellants Robert Cissna and Lisa Craig (Appellants), who were the sellers in a real estate transaction in April 2000 that gave rise to this quiet title proceeding, appeal from the June 2007 default judgment entered against them and from the related ruling of September 18, 2007 that denied their motion to set aside the defaults and default judgment. (Code Civ. Proc., §§ 473, 473.5; all statutory references are to the Code of Civil Procedure unless otherwise indicated.) Appellants contend the pleadings,

service and proof were inadequate to justify the entry of the defaults and default judgment in favor of the buyer and her co-owners, plaintiffs and respondents Dawn Wilson Kozicki, Joseph Kozicki and the Kozicki Family Community Property Trust (Respondents or Kozicki). The judgment included quiet title orders, statutory penalties for failure to timely provide beneficiary statements, punitive damages for fraud, and attorney fees and costs. (§ 764.010; Civ. Code, § 2943, subd. (e).)[1]

Appellants also assert that the superior court abused its discretion in denying their motion to set aside the default judgment. We have reviewed the record and the arguments and conclude the trial court did not abuse its discretion in denying the motion for relief, because the defaults were properly entered after service by publication was completed and there is no showing of intrinsic or extrinsic fraud in the processing of service or the requests for default.

Moreover, the default judgment is supported by substantial evidence, with these exceptions: The judgment must be affirmed as modified to reduce the amount of statutory penalties to that reflected in the published summons, which set forth the statement of damages ($600 for a total of two statutory violations). (Civ. Code, § 2943, subd. (e)(4).) Moreover, the judgment will be affirmed as modified to reduce the two awards of $50,000 punitive damages against each of the Appellants, to amounts that are

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1 Defendants Heather Martin and Deborah Bergin were trustees involved in an effort by Appellants in 2005 to foreclose on the property, and the judgment includes orders against them, but they are not parties to this appeal. Also, the judgment made orders to defendant Christian Craig regarding quiet title, but he is not a party to this appeal. The same is true of the defendant in the consolidated case, Karl Aiken, as will be explained later. Our opinion affects only the parties who participated in this appeal.

constitutionally proper in light of the monetary penalties awarded and proportionality principles (six times the joint $600 award, or one award of $3,600 to be jointly and severally assessed against both Appellants Cissna and Craig). (See *Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 213 (*Gober*); *Simon v. Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1187 (*Simon*).) We draw these conclusions from the documentary record of the default prove-up evidence at the hearing and the motion to set aside the judgment. On remand, the trial court is directed to prepare a modified judgment reflecting these changes to the monetary penalty and punitive damages awards, with the remainder to remain the same, and as so modified, the judgment will be affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Underlying Transaction and Complaint; Service/Publication

We will confine our statement of facts to those that are relevant to the issues on appeal concerning the validity of the default judgment and the denial of the motion to vacate the default judgment. In April 2000, Appellant Cissna and Ms. Craig's predecessor in interest, her now-deceased husband Al Craig, entered into a real estate purchase contract to sell an unimproved parcel in Carlsbad to which they held title, commonly known as Lot 110 and Lot 114. The buyer was Respondent Dawn Wilson (who later married Kozicki). In return for Wilson's down payment of $10,000 and

payment of the realtor's $7,000 fee, the sellers took back her promissory note for $53,000.[2]

On behalf of Wilson, Joseph Kozicki wrote checks on an Illinois bank for monthly payments on the note from 2000 through the beginning of 2002. As requested by Cissna and Craig, these payments were sent to the two Los Angeles area post office boxes they supplied (P.O. Box 2262 in Hollywood, and P.O. Box 3024 in Long Beach). In 2003, after Wilson and Kozicki were married, Wilson transferred the property to the Kozicki Family Community Property Trust.

At the beginning of 2002, payments sent by Kozicki and Wilson to those Los Angeles area post office boxes for Cissna and Craig were returned unclaimed. In April 2002, Kozicki sent several letters requesting a beneficiary statement. (Civ. Code, § 2943, subd. (b).) These were also returned unclaimed.

In May 2002, Cissna and Al and Lisa Craig wrote Dawn Wilson and Kozicki from the same Hollywood P.O. Box address that had been used for the payments (although the payments had been returned), telling her that she was behind on the real estate tax payments and their security interest could be affected. They said they would provide her a statement of the outstanding balance as soon as they received a $60 fee authorized by the Civil Code and proof of payment of taxes. (They may have been referring to the $30

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[2] The seller was originally listed as Ute Grundmann, wife of Al Craig, which may be another name by which Lisa Craig is known, and Lisa Craig is the widow of Al Craig. The signers of the contract as sellers were Robert Cissna and Al Craig. The form sale contract includes an attachment supporting seller financing, including references to a $53,000 note payable by Wilson to Cissna and Craig, and a $7,000 fee payable by Wilson to the realtor. The contract has an attorney fees clause.

charge authorized by Civ. Code, § 2943, subd. (e)(6) for such a statement.) They notified her that the trust deed had become all due and payable May 2, 2002. She paid the fee and taxes but contact was suspended after that, when Respondents' letters to Appellants were again returned to sender.

In early 2005, Respondents tried to sell the property to a third party and their escrow company, Pickford, sent letters to Appellants requesting a payoff amount. In their letter to Pickford dated February 25, 2005, Appellants responded that the trust deed had not been paid off and was in default, and they would be contacting the trustor directly. The return address given was the same Hollywood P.O. Box they used in previous correspondence.

In June 2005, Respondents filed the original complaint against these Appellants (including Ms. Craig's predecessor in interest, her deceased husband Al Craig), and the substitute trustee that Appellants had recently named, Heather Martin. Respondents alleged that Appellants had filed a notice of default stating that the amount due on the property was approximately $325,482. On June 27, 2005, Respondents recorded a notice of pending action on the property. The summons and complaint were mailed to the defendants at their addresses of record.

Meanwhile, Appellants were filing documents to proceed with their own trustee's sale of the property, and they substituted a new trustee by a recorded document on April 6, 2005. They recorded a notice of trustee's sale for early August 2005. Respondents discovered this when they were researching title, and they amended the complaint in August 2005 to add several new defendants, including another relative of Appellants,

Christian Craig, and the second of the substituted trustees who participated on behalf of Appellants, Deborah Bergin. Respondents alleged that they had discovered the recorded trustee's sale documents showing that on August 29, 2005, Appellants had sold the property to themselves for the face amount of the note, $53,000.

In their first amended complaint (FAC), Respondents alleged causes of action seeking (against all defendants) to set aside the August 2005 trustee's sale and to cancel that trustee's deed, and to quiet title. Respondents alleged that they were entitled to an accounting and damages for breach of contract and fraud, including punitive damages. In support of the fraud claim, they alleged that Appellants never intended to comply in full with the contract but instead accepted 22 payments and began to reject the last two, as well as all requests for payoff demands over two years. They alleged the recent trustee sale was fraudulently conducted in several respects. Additionally, as statutory damages, they sought penalties payable under Civil Code section 2943, subdivision (e)(4) (for failure to timely supply beneficiary statements).

Efforts to serve Appellants with the complaints were unsuccessful. Service by mail was unsuccessful at the same post office boxes previously used by Appellants, they were not present at any physical addresses that they had previously used, and no new addresses for them could be found. However, after applying for an order for service by publication in August 2005, Respondents obtained a preliminary injunction against the sale of the property and recorded it September 19, 2005. They filed a statement of damages sometime before January 2006.

Due to ongoing difficulties in serving Appellants, in January 2006, Respondents obtained an order for service of the summons and amended complaint by publication. Several publications were made, and after clerical errors were corrected, service was completed in April 2006. The published summons included the following statement of the relief requested: To quiet title, $5,000 in property damage, attorney fees of $18,000, legal costs of $5,000, $600 for two violations of Civil Code section 2943, subdivision (e)(4), and also: "Plaintiff reserves the right to seek punitive damages in the amount of $50,000.00 when pursuing judgment in the suit filed against you." (§ 425.115 [sets forth the above language to be used when punitive damages are sought].)

B. Default Entry on FAC; Prove-Up Hearing

On July 20, 2006, Respondent obtained the clerk's entry of Appellants' defaults, with Ms. Craig defaulted on her own behalf and also as the successor to Al Craig. (Defaults of the nonappealing defendants were also obtained at the same time, for a total of six entries; see fn. 1, *ante*.)

After Appellants' defaults were entered July 20, 2006, Kozicki learned that sometime in 2006, Appellants or someone else put a for sale sign on the property, and Appellants received an offer to buy it. In January 2007, Respondents' attorney informed the court that a second action had been filed against that potential buyer from Appellants of the same property, Karl Aiken. The court ordered the cases to be consolidated.[3]

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[3] In the default judgment, plaintiffs were allowed costs against defendant Karl Aiken ($451). His default is not in the record. He has not appealed and we offer no opinion on the validity of that provision.

Respondents obtained a hearing date of June 8, 2007 to prove up the default judgment and submitted their "brief summary of the cases." This included numerous exhibits of the original real estate transaction, including letters between the parties and Pickford escrow, and Respondents' records of payments made (22 of 24 payments of approximately $2,500 each were made). Various documents showing that mailings were not received or were returned from Appellants' known addresses were supplied. Additionally, Respondents provided the recorded documents showing Appellants' efforts to substitute a new trustee, record Respondents' default, and conduct their own trustee's sale. Respondents filed an attorney declaration seeking fees and costs.

The default prove up hearing was conducted in June 2007, with Respondent Joseph Kozicki (trustee of the family trust) available for testimony. The trial court suggested the default be proven up by having the attorney present the exhibits and then having the witness attest to them, and the matter was handled accordingly.

C. Default Judgment

Following the hearing, the trial court entered a default judgment on June 8, 2007. It ordered, first, that the sale of the subject property referenced in the Appellants' deed of sale recorded August 29, 2005 was deemed null and void and of no force and effect. Appellants Cissna and the Craigs were ordered to deliver that trustee's deed to the court, and it was cancelled. Likewise, Cissna and Craig were ordered to deliver the original 2000 trust deed to the court and it was cancelled.

Regarding the request for quiet title, the court ordered title to be quieted in the name of Respondents: "The Kozicki Family Community Property Trust shall have all

rights of ownership and possession to the exclusion of all others. Defendants Robert Cissna, Lisa Craig and Christian Craig have no right, title, estate, lien, or interest in the properties."

As statutory penalties against Appellants, the default judgment assessed against Cissna, in favor of the family trust, $1,800 for violating Civil Code section 2943, subdivision (e)(4) "on at least six separate occasions." The same type of order was assessed against Ms. Craig (as successor in interest to Al Craig, $1,500 for violating Civ. Code, § 2943, subd. (e)(4) "on at least five separate occasions"). Likewise, on her own behalf, Ms. Craig was ordered to pay the trust $600 for violating Civil Code section 2943, subdivision (e)(4) "on at least two occasions." (Total: $3,900 v. all these Appellants; however, only $600 for two violations appeared in the published summons.)[4]

As against Appellants (and also defendants Martin, Bergin and Christian Craig, nonappellants), attorney fees in the sum of $14,780 and legal costs in the sum of $6,373.39 were ordered. (However, only $5,000 costs appeared in the published summons.)

Regarding the request for punitive damages, Respondents were allowed to recover exemplary damages in the sum of $50,000 against each Appellant, Cissna and Lisa Craig. No "loss of use" property damages were assessed, although the published summons referred to them.

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4 Former trustee Martin was assessed $900 for allegedly violating Civil Code section 2943, subdivision (e)(4) on at least three occasions. She has not appealed.

After the June 8, 2007 judgment was filed, on June 27, 2007, Appellant Cissna, in pro per, filed his own notice of appeal. (D051200.) It was dismissed by this court for failure to pay filing fees on August 9, 2007.

D. Motion to Set Aside; Denial; Appeal

In September 2007, Appellants brought their motion, in pro per, to have the July 2006 defaults and June 2007 default judgment set aside. (§§ 473, 473.5.) The motion listed the same post office box return address in Hollywood that they had previously used for mailings and letters. They provided their declarations denying that they had avoided any payments or any service. They stated that they believed Kozicki was a complete stranger to the agreement because it originally was entered into by Dawn Wilson. They had incurred costs for weed abatement and believed that their security interest was harmed by an SDG&E easement. They said they began nonjudicial foreclosure proceedings in April 2005 because they had not heard anything from Dawn Wilson since February 2002. They said they were unaware of any service by publication.

Respondents opposed the motion on the basis that no excusable neglect had been shown, and the defaults and default judgment were supported by the record. They provided most of the same exhibits that were presented at the prove up hearing, and argued that in their efforts to serve Appellants, they had used various addresses that were given to them by Appellants. They provided their statement of damages and a copy of the dismissal of the previous appeal.

At oral argument, Cissna claimed they had had difficulties with receiving mail at the post office boxes, and were traveling some of the time. In its ruling, the court noted

the recent return of the case from the appellate court after the previous dismissal, and questioned whether it had jurisdiction to rule on the motion. In any case, the court ruled that since the six-month jurisdictional period had expired under section 473 for discretionary relief, no relief was available regarding the entry of defaults (dated July 20, 2006). Next, as to section 473.5 and the remaining arguments:

> "[T]he court finds that defendants have failed to provide the court with persuasive evidence that they did not receive actual notice. The court finds evidence that the summons and complaint were mailed to the defendants at their address of record prior to 8/1/05. [Citation.] [¶] As to the argument regarding fraud, there is no evidence that the default or default judgment were taken by extrinsic fraud or mistake. [¶] The court finds that the service of the summons and complaint by publication was otherwise valid. [¶] Finally, the court finds that notice of punitive damages was provided by the publication."

The motion to set aside default was denied. On November 9, 2007, both Appellants filed their current notices of appeal from the June 8 judgment and the September 18 ruling on the motion. The record has been augmented to include the exhibits for the default prove-up hearing, the notice of lodgment in opposition to the motion to set aside the default and default judgment, and related material (filed June 6, 2008).

E. Supplemental Briefing and Augmentation

In the course of preparing this matter for disposition, we sent out a letter notifying counsel and the parties that the record was incomplete, and requested that the minute order and reporter's transcript from the default prove up hearing conducted on June 8, 2007, be supplied, if available. Counsel for Respondents supplied them by preparing a respondent's appendix and providing copies of those documents. (Cal. Rules of Court,

rule 8.155.) Additionally, Appellants supplied a supplemental letter brief as allowed by the court's letter, although we note that it mainly re-argues the merits, which is inappropriate on appeal. It also objects to inclusion in the record of some of the augmented material, but it appears all those documents were before the trial court and can now be considered to the extent they are admissible.

DISCUSSION

Appellants make closely related contentions that the default judgment and/or the denial of the motion for relief represent abuses of discretion by the trial court, or are void on this record due to inadequate pleading and/or service of the FAC. We will discuss, separately, the propriety of the order denying the motion and the validity of the default judgment.

First, however, we address the request in the Respondents' brief to dismiss the matter, in light of the previous appeal by Cissna that was dismissed. Immediately after the June 8, 2007 judgment was issued, Appellant Cissna, in pro per, filed his own notice of appeal on June 27, 2007. (D051200.) That appeal was dismissed by this court on August 9, 2007, for failure to pay the filing fee. (Cal. Rules of Court, rule 8.100(c)(3); all further rule references are to the California Rules of Court)

After the motion to vacate the default was denied in September 2007, both appellants filed their current notices of appeal, on November 9, 2007, from the June 8 judgment and the September 18 denial of relief from default. Those notices of appeal were timely pursuant to rule 8.108(c), because the underlying judgment may be reviewed

together with the ruling on the motion denying relief from default. There is no jurisdictional impediment to reaching the merits of this appeal.

I

BASIC STANDARDS OF REVIEW

This appeal seeks reversal of both the default judgment and the order denying relief from default. A claim for relief from default may be based upon alleged voidness of the resulting judgment, or may raise the grounds stated in section 473 to support an order setting aside the default (i.e., mistake, inadvertence, surprise or excusable neglect). (*Dill v. Berquist Construction Co.* (1991) 24 Cal.App.4th 1426, 1441 (*Dill*); *In re Marriage of Andresen* (1994) 28 Cal.App.4th 873, 883, fn. 8 (*Andresen*).)

A motion to set aside a default and default judgment is addressed to the sound discretion of the trial court, and, in the absence of a clear showing of abuse of discretion, the trial court's order granting the motion will not be disturbed on appeal. (*Weitz v. Yankosky* (1966) 63 Cal.2d 849, 854; *Lint v. Chisholm* (1981) 121 Cal.App.3d 615, 619-620.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.)

II

MOTION FOR RELIEF FROM DEFAULT

In analyzing the denial of relief from default, we inquire if the statutory conditions authorizing entry of the default were satisfied, and whether the trial court properly

exercised its discretion to deny relief. Appellants' arguments, as framed in their notice of appeal, are that they were not actually served, and the service by publication did not actually give them notice, "and that furthermore the defendants had no actual knowledge of this matter so as to be able to actually defend against it." These claims require us to examine the manner in which service was achieved (publication).

To do so, we first address the nature and timeliness of their motion for relief, filed in August 2007. It was untimely as to the clerk's entry of the defaults in July 2006, because it was made more than six months after the default was taken by the clerk. This time period specified in section 473 begins to run when the default is suffered or judgment is entered, not when the party learned of it. (See, e.g., *Dill, supra,* 24 Cal.App.4th 1426, 1441.) Thus, even if a party learned of an order taken against him or her after six months, he or she cannot challenge that order under section 473, unless section 473.5 applies.

Section 473.5 excuses a party from the section 473 time limit if service of summons has not resulted in actual notice to a party in time to defend the action. (§ 473.5, subd. (a).) Under those circumstances, the notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of two years after entry of the default judgment or 180 days after service on him or her of a written notice that the default or default judgment has been entered. (§ 473.5, subd. (a).) Subdivision (c) of section 473.5 then provides that if the court finds the motion was made in a timely manner within the period permitted by subdivision (a), and the moving defendant's lack of actual notice in time to defend the action was "not caused by his or her avoidance of

service or inexcusable neglect, it may set aside the default or default judgment on whatever terms as may be just and allow the party to defend the action."

Assuming the motion was timely under section 473.5, we next examine Appellants' support for their claims they had no actual knowledge of this matter so as to be able to actually defend against it, in light of the service by publication that was ordered. The applications for the publication orders stated that the normal methods of service had been attempted but were unsuccessful, and Respondents' efforts to find different addresses for Appellants had been unsuccessful, even though diligent.

Pursuant to section 585, subdivision (c), "in all actions where the service of the summons was by publication, upon the expiration of the time for answering, and upon proof of the publication and that no answer [or other designated response] has been filed, the clerk, upon written application of the plaintiff, shall enter the default of the defendant." (See 6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 171, pp. 612-613.) Section 585, subdivision (c) sets forth the procedure for the plaintiff to apply to the court for the relief demanded in the complaint. The statute expressly requires that the court shall not render judgment in the plaintiff's favor for any relief that exceeds "the amount stated in the complaint, in the statement required by Section 425.11, or in the statement provided for in Section 425.115," and may award relief "as appears by the evidence to be just." (§ 585, subd. (c).)

Once proof of publication was provided, the clerk had the authority to enter the defaults, and did so on July 20, 2006. To set them aside, Appellants were required to make a showing before the trial court that basically, there was no adequate justification

for resort to service by publication, as allowed by section 415.50, subdivision (a). They could not make any such showing, because they could not explain why the same addresses and contact information they were currently using were not operative earlier, when Respondents were given them and used them in attempting to make payments on the original note, and obtain a beneficiary statement, and serve the complaint and notice of pending action, and give notice of the application for the preliminary injunction. Instead, no explanation was given by Appellants why the previously attempted normal methods of service should have failed, when those methods used addresses recently given to Respondents by Appellants, and where further investigation was conducted but proved to be futile.

It was not enough for Appellants, in their declarations, to merely deny any actual notice of the court proceedings, or to object to the method of service by publication, when their own actions were otherwise convincingly shown by Respondents to have made those necessary. The trial court had the ability to evaluate the credibility of the opposing showings on the motion, and did not have to give credence to Appellants' versions of the facts. No adequate showing was made that Appellants were prevented by anything that Respondents did or the court did from taking action to protect their own interests in the matter. (§ 473.5.)

In light of all the circumstances of the case, we think that the trial court did not abuse its discretion in denying relief from default. We next evaluate the validity of the default judgment.

III

VALIDITY OF DEFAULT JUDGMENT

In the alternative to vacating the defaults, Appellants argue we should reverse the default judgment for invalidity due to alleged violations of their rights to due process and equal protection, or their rights against impairment of contracts or unlawful taking of property by fraud. In our request to the parties to supplement the record and address certain issues, we briefly outlined the allowable scope of relief awarded in a default judgment, as follows:

> "Under Code of Civil Procedure 580, '[t]he relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint, in the statement required by Section 425.11, or in the statement provided for by Section 425.115 . . . .' 'It is well settled that a default judgment outside the scope of the demand is in excess of jurisdiction, and is subject to collateral attack. [Citations.] However, if a default judgment is only partially void for being excessive, an appellate court will strike the excess and affirm the judgment as to the valid amount of recovery. [Citation.]' (6 Witkin, Cal. Procedure, *supra*, § 149, pp. 583-585.)"

With these basic principles in mind, we next explain the analysis to be used in evaluating the validity of the different types and amounts of relief awarded in the judgment.

A. Scope of Review

The rules for reviewing a judgment that was obtained after a properly taken default of the defendant are well settled. As outlined above, Appellants have not shown the trial court erred or abused its discretion when it found there was no extrinsic or intrinsic fraud that prevented them in any way from learning of or defending the action.

Through their own choices, Appellants were in default when the judgment was rendered, and at that time, these rules applied:

> "The clerk's entry of default cuts off the defendant's right to take further affirmative steps such as filing a pleading or motion, and the defendant is not entitled to notices or service of pleadings or papers. 'A defendant against whom a default is entered is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action.' Thus, the defendant may not, until the default is set aside in a proper proceeding, file pleadings or move for a new trial, or demand notice of subsequent proceedings." (6 Witkin, Cal. Procedure, *supra,* § 175, pp. 617-618; § 170, pp. 610-612; see *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385-386 (*Devlin*).)

Nevertheless, when a defendant is in default, this failure "to answer admits only facts that are well pleaded. [Citation.] If the complaint fails to state a cause of action or the allegations do not support the demand for relief, the plaintiff is no more entitled to that relief by default judgment than if the defendant had expressly admitted all the allegations. Such a default judgment is erroneous, and will be reversed on appeal. [Citations.]" (6 Witkin, Cal. Procedure, *supra,* § 183, pp. 622-623.)

As explained in 6 Witkin, California Procedure, section 170, page 610, at the default prove up hearing: "Only evidence in support of the allegations of the complaint is admissible. [Citation.] If the evidence is sufficient to support those allegations, the court must enter judgment for the plaintiff. [Citation.] If the evidence does not support the allegations, the court will deny a default judgment. [Citations.]"

It is also well settled that even after default, these Appellants may properly seek review of the damages award through their direct appeal from the judgment. (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1749 [claim of lack of substantial evidence

supporting damage award to be made only by motion for new trial or appeal from default judgment, not from appeal of motion to vacate judgment].) In challenging a default judgment on appeal, a party may assert that there is insufficient evidence to support the damages awarded: " '[T]he general rule that the sufficiency of the evidence tendered in a default proceeding cannot be reviewed on an appeal from a default judgment . . . is true as to matters for which no proof is required by virtue of the admission by default of the allegations of the complaint. [Citation.] However, as to damages which, despite default, require proof[,] the general rule does not apply.' " (*Scognamillo v. Herrick* (2003) 106 Cal.App.4th 1139, 1150.) Thus, damages awarded on a default judgment may be reversed not only where the award is so excessive that it "shocks the conscience" and is the result of "passion [or] prejudice," but also where "the damages awarded are unsupported by sufficient evidence." (*Ibid*.)

When a ruling is challenged on appeal for lack of substantial evidence, our power begins and ends with a determination of whether there is any substantial evidence, contradicted or uncontradicted, to support the trial court's findings. (*Thompson v. Tracor Flight Systems, Inc*. (2001) 86 Cal.App.4th 1156, 1166.) We must view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. (*Ibid*.) When two or more inferences can reasonably be deduced from the facts, a reviewing court does not substitute its deductions for those of the trial court. (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 912.)

To the extent our review evaluates legal conclusions drawn by the trial court from the undisputed procedural facts, we utilize a de novo standard. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799 ["When the decisive facts are undisputed, we are confronted with a question of law and are not bound by the findings of the trial court."].) The decisive facts here are whether the published summons sought different relief than did the FAC or proof at the hearing. The issue is whether the notice given to Appellants of the relief sought was adequate under these circumstances, based on the entire sequence of events.

Notwithstanding our power to review the validity of the record support for the provisions of the default judgment, we do not act as a trial court nor relitigate the merits of the plaintiffs' case. Thus, although Appellants' notice of appeal and briefs apparently seek to try certain alleged defenses and theories here for the first time, we cannot properly address them (e.g., the parties or the court "reforming the contract to include new parties not agreed to by the defendant, invalidating a foreclosure properly performed after the plaintiffs had defaulted in their performance of the contract" or "damaging the defendant's security interest in the property by deeding away the part of the property [by easement] . . . ."). Since the entry of default was valid, we examine the judgment to assure that the relief awarded was properly sought and published in the FAC and summons.

B. Quiet Title and Fraud

With respect to the cause of action to quiet title, since the service of the summons was by publication, certain statutory requirements apply under section 585, subdivision

(c): "In all cases affecting the title to or possession of real property, where the service of the summons was by publication and the defendant has failed to answer . . . [and for] a claim upon a paper title, the court shall require evidence establishing the plaintiff's equitable right to judgment before rendering judgment." (See 6 Witkin, Cal. Procedure, *supra,* § 171, pp. 612-613.) Under section 764.010:

> "The court shall examine into and determine the plaintiff's title against the claims of all the defendants. The court shall not enter judgment by default but shall in all cases require evidence of plaintiff's title and hear such evidence as may be offered respecting the claims of any of the defendants, other than claims the validity of which is admitted by the plaintiff in the complaint. The court shall render judgment in accordance with the evidence and the law."

Also pursuant to section 585, subdivision (c), "the court shall hear the evidence offered by the plaintiff, and shall render judgment in the plaintiff's favor" for the amount that "appears by the evidence to be just," not exceeding the amount stated in the complaint or in the statement of damages. (*Ibid.*, 6 Witkin, Cal. Procedure, *supra*, § 171, pp. 612-613.) Here, the court took documentary evidence, which was confirmed by testimony from one of the Respondents, and from that evidence, the basis of the quiet title orders included the setting aside of the August 2005 trust deed's sale that Appellants tried to conduct, and the payments made by Respondents. In light of that evidence, Appellants have never explained their actions in any rational way, nor accounted for their sporadic communications between 2002 and 2005 with Respondents about Respondents' repeated efforts to pay off the remaining two payments. The evidence further included Respondents' recorded notice of pending action on the property (June 27, 2005).

Respondents obtained a preliminary injunction against the sale of the property and recorded it September 19, 2005.

During the same time period, Appellants were filing and recording documents to proceed with their own trustee's sale of the property: Substitution of a new trustee on April 6, 2005; recorded notice of trustee's sale on August 4, 2005; and trustee's sale documents of August 29, 2005, when Appellants sold the property to themselves. During this activity, Appellants would normally have been researching title and would have likely found the recorded notice of pending action and preliminary injunction. In any case, they were on constructive notice of them. From all the evidence, Respondents' fraud claim may be deemed to be supported, that Appellants never intended to comply in full with the contract but instead accepted most payments, but then began to reject the last two and all requests for payoff demands, for over two years. Thus, the trial court had an adequate basis to infer that Respondents had presented evidence supporting their fraud cause of action. More than mere allegations were made, and the quiet title findings were sufficient under section 764.010 and also impliedly support liability for fraud. (See 6 Witkin, Cal. Procedure, *supra,* § 158, pp. 598-600.)

The issue next arises whether the FAC's prayer and the statement of damages gave Appellants sufficient notice of the monetary amount of punitive damages that might be sought as recovery for such fraud. Pursuant to section 425.115 , subdivisions (b), (f) and (g), Respondents preserved their right to seek punitive damages pursuant to Civil Code section 3294 in a default judgment by serving, before default was taken, their statement of punitive damages by publication (up to $50,000). It is not improper to obtain a default

judgment for punitive damages if all procedural protections are afforded. (*Devlin*, *supra*, 155 Cal.App.3d 381, 385-386; §§ 425.11, 415.50.)

This record accordingly supports an interpretation that some liability for fraud and punitive damages was proven, and the notice given by publication was for an amount up to $50,000. (§ 580, subd. (a).) However, additional constitutional protections apply, as a matter of law, against awards of punitive damages. As outlined by this court in *Gober*, *supra*, 137 Cal.App.4th 204, only an amount of punitive damages may be awarded that is consistent with constitutional principles and the facts proven. Federal law has created extensive guideposts for de novo review on constitutional grounds of the proper limitations on punitive damages awards. (*State Farm v. Campbell* (2003) 538 U.S. 408 (*State Farm*).) However, before we can address and apply these rules affecting the amount of punitive damages awarded here, we acknowledge that in this case, the main relief awarded was quiet title, and the statutory penalties were the only monetary award, other than attorney fees and costs. We next discuss the correct amount of those penalties and then will return to the punitive damages issue.

C. Statutory Penalties

Under Civil Code section 2943, subdivision (e)(4), if a beneficiary (such as Appellants) "for a period of 21 days after receipt of the written demand willfully fails to prepare and deliver the statement, he or she is liable to the entitled person for all damages which he or she may sustain by reason of the refusal and, whether or not actual damages are sustained, he or she shall forfeit to the entitled person the sum of three hundred dollars ($300). Each failure to prepare and deliver the statement, occurring at a time

when, pursuant to this section, the beneficiary is required to prepare and deliver the statement, creates a separate cause of action, but a judgment awarding an entitled person a forfeiture . . . , for any failure to prepare and deliver a statement bars recovery of damages and forfeiture for any other failure to prepare and deliver a statement, with respect to the same obligation, in compliance with a demand therefor made within six months before or after the demand as to which the award was made."

This statutory language gives rise to several problems with the awards in the default judgment of certain sums for enumerated violations of Civil Code section 2943, subdivision (e). First, the judgment should not exceed the amounts for these alleged violations that appeared in the published statement of damages ($600 for two violations). (§ 425.115.) Second, the judgment does not specify when the numerous violations were allegedly committed, and how they fit within the above statutory time limitations. Third, it is not clear which two violations, and by whom, were listed in the published summons.

Our analysis of this record leads us to conclude that no award as statutory penalty is justified over the amount published, $600, and that this amount should be considered to be jointly and severally awarded against Appellants. A default judgment can be valid in some respects and not others, and a reviewing court is allowed to correct or modify a judgment which contains an unauthorized provision, based on "the principle that the judgment exceeds the trial court's jurisdiction solely to the extent the relief awarded by the judgment surpasses the allegations of the complaint." (*Andresen, supra,* 28 Cal.App.4th 873, 886, fn. omitted; *In re Marriage of Lippel* (1990) 51 Cal.3d 1160, 1167.) We next consider how this affects the award of punitive damages.

D. Punitive Damages

As explained by this court in *Gober, supra*, 137 Cal.App.4th 204, 212, both state and federal appellate courts will conduct de novo review of punitive damages awards that have been challenged for being constitutionally excessive. (*State Farm, supra,* 538 U.S. 408, 418; *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 433-434.) The rationale for this type of de novo review is that " ' "[u]nlike the measure of actual damages suffered, which presents a question of historical or predictive fact, . . . the level of punitive damages is not really a 'fact' 'tried' by the jury." ' [Citations.]" (*Gober, supra,* at p. 212.)

In making such determinations, an appellate court will enforce the policy that since punitive damages are different from compensatory damages, "they must bear a reasonable relationship, and be proportionate, to compensatory damages. [Citations.]" (*Gober, supra,* 137 Cal.App.4th at pp. 212-213.) These principles have been developed such that there is no bright line rule that sets the proper ratio of compensatory to punitive damages, but this ratio "should generally be no higher than 4 to 1 and almost never more than 9 to 1." (*Gober, supra,* at p. 213, citing *State Farm, supra,* 538 U.S. at p. 425.)

The California Supreme Court confirms that "the constitutional excessiveness of a punitive damages award presents a legal issue that appellate courts could determine independently." (*Gober, supra,* 137 Cal.App.4th at p. 213, citing *Simon, supra,* 35 Cal.4th 1159, 1187.) When deciding a constitutional maximum for such an award, "a court does not decide whether the verdict is unreasonable based on the facts; rather, it examines the punitive damages award to determine whether it is constitutionally

excessive and, if so, may adjust it to the maximum amount permitted by the Constitution." (*Gober*, *supra*, at p. 214, citing *Simon, supra*, at p. 1188.)

Again as laid out in *Gober*, in conducting this type of de novo review, we follow well-established "guideposts" as set forth in United States Supreme Court case law: " '(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.' " (*Gober, supra,* 137 Cal.App.4th at pp. 215-216, citing *State Farm*, *supra*, 538 U.S. at p. 418; *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 575.) In this process, findings of historical fact must be accepted as true, if supported by substantial evidence. (*Simon, supra,* 35 Cal.4th at p. 1172.)

In particular, the second guidepost (ratio of punitive damages to the actual or potential harm established as to the claimant), is subject to limitations that have some flexibility. As this court set forth in *Gober,* quoting from *State Farm*, *supra*, 538 U.S. at page 425, " 'few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process' " and a four-to-one to 1 ratio " 'might be close to the line of constitutional impropriety.' " (*Gober, supra,* 137 Cal.App.4th 204 at p. 222.) Only where there are "extraordinary factors, such as extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages," would punitive damages be justifiable in excess of a single-digit ratio. (*Ibid.*, citing to *State Farm*, *supra*, 538 U.S. at p. 425; *Simon, supra*, 35 Cal.4th at p. 1182.)

Regarding the third guidepost, comparable civil penalties, these were actually awarded here under Civil Code section 2943, subdivision (e)(4), and that $600 is supported by the record. We think that under the relevant guideposts, the trial court's award of punitive damages was excessive and should have been more closely related to the only other monetary award (i.e., $600), as opposed to the original disproportionate sums. We cannot properly consider the separate attorney fees or costs awards when reviewing a record to establish a constitutional maximum for a punitive damages award.[5] In *Gober, supra,* 137 Cal.App.4th 204, we explained that a six-to-one ratio was not the amount we believed the jury should have awarded, what this court would have awarded if we were triers of fact, or what ratio will always be appropriate under similar facts. Instead, we said that on that record, "this ratio is the absolute constitutional maximum that could possibly be awarded under these particular facts. [Citation.]" (*Id.* at p. 223.)

Here too, on this record and under the standards set forth above, it was error for the trial court not to reduce the punitive damages requested to about six times the monetary award otherwise made. Where the amount awarded by the judgment is larger than the amount proven up, and no contrary express or implied findings are made to support that choice, error is shown. Under section 585, subdivision (c), the trial court had the duty in this default proceeding to "render judgment in the plaintiff's favor" for the

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5 The judgment awarded costs of $6,373.39, although the published statement of damages estimated $3,700. (§ 1032.) There is no constitutional infirmity in treating ordinary litigation costs differently from damages for purposes of evaluating an award upon default of punitive damages, because costs can be objectively anticipated and are statutorily controlled.

amount that "appears by the evidence to be just," not exceeding the amount stated in the complaint or in the statement of damages. (6 Witkin, Cal. Procedure, *supra*, § 171, pp. 612-613.) The trial court should have more fully assessed the state of the pleadings, the state of service and the evidence, even in light of the default nature of the proceedings. The punitive damages award should not have exceeded a reasonable multiplier of the actual damages or penalties awarded. The amount of the punitives requested must be reduced to $3,600, payable jointly and severally. It is appropriate for this court to affirm the default judgment as modified only in these respects, and the trial court will be directed to prepare such a modified judgment.

DISPOSITION

The order and default judgment are affirmed as modified, to reduce the amount of statutory penalties to that reflected in the published summons ($600 for a total of two statutory violations), and to reduce the two awards of $50,000 punitive damages against Appellants, to an amount that is constitutionally proper in light of the monetary penalties awarded and proportionality principles (i.e., six times the joint $600 award, or one award of $3,600 to be jointly and severally assessed against Appellants). Upon return of the

remittitur, the trial court is directed to prepare a modified judgment that will reflect these corrections, with the remainder to remain the same. Costs on appeal are awarded to Plaintiffs and Respondents.

HUFFMAN, Acting P. J.

WE CONCUR:

McDONALD, J.

IRION, J.